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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK,
Special Administrator and Personal Representative of the
ESTATE OF CURTIS B. CAMPBELL,
Respondents.

On Petition For A Writ Of Certiorari
To The Utah Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In defiance of this Court's admonition that "application of the *Gore* guideposts to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages," 538 U.S. 408, 429, the Utah Supreme Court on remand imposed a punitive damages award that is *nine* times the compensatory damages award, relying in large part on the "lack of remorse" and "callousness" State Farm purportedly displayed in its pleadings.

Amicus will address the following questions:

1. Whether a defendant's nonfrivolous legal arguments and speech contained in pleadings challenging a punitive damages award may serve as the basis for punishment and for justifying the challenged award.

2. Whether the Utah Supreme Court misapplied the ratio guidepost, and violated this Court's mandate, by awarding punitive damages in an amount nine times the substantial $1 million compensatory damages award for emotional distress.

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OTHER AUTHORITIES

Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96 (2002) 16

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W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547 (2000) 16

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with over 130 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers ~~of pro~~ducts. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

In this brief, PLAC will address an issue of great importance to product manufacturers: the fair administration of punitive civil sanctions. Because plaintiffs routinely seek punitive damages in product liability cases, PLAC's members have a strong interest in ensuring that the constitutional limitations on such awards are strictly enforced, and that punitive damages are not used to punish defendants and their attorneys for vigorously challenging excessive and unconsti-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

tutional verdicts. Indeed, it is an increasing trend for plaintiffs to argue that a corporate defendant's conduct during the litigation is an appropriate basis for a substantial punitive damages award, and another case presenting this issue is pending before this Court. *See Barber v. Union Pacific R.R. Co.*, ___ S.W.3d ___, 2004 WL 352525 (Ark. Feb. 26, 2004) (imposing punitive damages based on alleged spoliation of evidence, *i.e.*, discovery-related conduct unconnected to the underlying tort), *petition for cert. pending*, No. 04-47 (docketed July 12, 2004).

STATEMENT

In vacating the Utah Supreme Court's original judgment, this Court held that the Utah court erred by "award[ing] punitive damages to punish and deter conduct that bore no relation to the Campbells' harm." 538 U.S. at 422. This Court explained that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* Due Process does not permit courts to punish a defendant "for being an unsavory individual or business," but rather requires that any punishment be strictly related to "the conduct that harmed the plaintiff." *Id.* at 423. For these reasons, the Court explained, "the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist." *Id.*

This Court also found that the Utah court erred in applying the ratio guidepost of *BMW v. Gore*, 517 U.S. 559 (1996), holding that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. It noted that "[t]he compensatory award in this case was substantial" and that the Campbells received "complete compensation" in that they "were awarded $1 million for a year and a half of emotional distress." *Id.* at 426. The Court also held that the award of emotional distress damages counseled in favor of a lower ratio, reasoning that such damages "likely were based on a component which was duplicated in the punitive award." *Id.*

In light of these principles, this Court concluded that "a punitive damages award at or near the amount of compensatory damages" would likely be appropriate. *Id.* at 429.

On remand, the Utah Supreme Court imposed a punitive damages award of approximately $9 million—nine times the amount of compensatory damages. While promising "unwavering fidelity to the letter and spirit of the mandate," the Utah court justified its ruling by characterizing this Court's ruling as offering "words of prediction, not direction." Petitioner's Appendix ("Pet. App.") 2a, 5a. The Utah court based the punitive damages award in large part on its determination that "State Farm has not voiced so much as a whisper of apology or remorse," as evidenced by State Farm's arguments in its appellate briefs and at trial. *Id.* at 12a-13a. The court emphasized its continuing "incredulity" over the fact that "State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case," concluding that "State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." *Id.* (citation omitted).

Turning to the ratio guidepost, the Utah court deemed this Court's holding "plausible as an abstract proposition," but not binding on remand because it "does not account for the circumstances of the compensatory damages award in this case." Pet. App. 15a. The court then held that the presence of emotional distress damages warranted a *higher* ratio, because "conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *Id.* at 16a. In short, the Utah court concluded, "the trial court's determination that State Farm caused the Campbells $1 million of emotional distress warrants condemnation in the upper single-digit ratio range rather than the 1-to-1 ratio" endorsed by this Court.

SUMMARY OF ARGUMENT

The Utah court expressly punished State Farm for submitting briefs and asserting legal positions that the court

deemed "callous" and demonstrating a "lack of remorse." This conclusion cannot be reconciled with the First Amendment's protection of free speech and the right to petition government, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. The court did not find State Farm's arguments frivolous or made for an improper purpose—nor could it, given that State Farm *prevailed* on many of those arguments before this Court. Indeed, this Court and many others have recognized in a variety of contexts that punitive sanctions are inappropriate when reasonable people could disagree about the propriety of the challenged arguments or conduct. Permitting this $9 million punishment to stand would chill vigorous advocacy and send a warning sign to litigants and their counsel that additional punishment may await those who have the temerity to defend themselves or assert legal positions a court may deem insufficiently remorseful.

The Utah court blatantly defied this Court's mandate concerning the proper application of the ratio guidepost. The Utah court is not alone in this regard: many courts, including courts reconsidering cases in light of *State Farm*, have ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. The ratio requirement is particularly important in product liability cases, where the compensatory damages are often substantial, yet the defendant's level of reprehensibility is low. This Court should grant review to reinforce that a 1:1 limit in such cases is not merely a "prediction," Pet. App. 5a, but a meaningful restriction on punitive damage awards.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM AND CLARIFY THAT PUNITIVE DAMAGES MAY NOT BE BASED ON A DEFENDANT'S LITIGATION POSITIONS AND SPEECH

This Court squarely held that State Farm was not a recidivist, and barred the Utah court from imposing or increasing punitive damages on that basis. 538 U.S. at 423 ("the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist"). On remand, the Utah court seemingly acknowledged that the inquiry must focus on "whether the reprehensible conduct was repeated," and conceded the total "absence of prior bad acts" by State Farm. Pet. App. 12a-13a. But the Utah court then evaded this Court's holding by reasoning that State Farm was likely to commit future misconduct because its litigation positions and pleadings demonstrated "callousness" and a "lack of remorse," and that a severe punitive sanction was therefore warranted. *Id.* at 13a.

The Utah court's reasoning is worse than just illogical: it flouts this Court's mandate in many respects. It *presumes* future recidivism and thus punishes State Farm for imaginary torts that it has never committed; it focuses on conduct that obviously does not "replicate[ ] the prior transgressions"; and it punishes State Farm "for being an unsavory individual or business" rather than for "the conduct that harmed the plaintiff." 538 U.S. at 423. If, as this Court held, it is improper to punish a company for unrelated bad acts that it has already committed, it is even *more* improper to punish a company for bad acts that have not occurred, that may never occur, that may or may not be related to the challenged conduct, and for which the company may have to pay damages if they *do* occur. *See* 538 U.S. at 423 (emphasizing due process dangers of "multiple punitive damages awards for the same conduct").

In addition to these violations of the mandate, the Utah court's opinion cannot be reconciled with numerous deci-

sions of this Court that have emphasized the strong First Amendment protections that attach to speech made in court proceedings, as well as the many decisions recognizing that the constitutional right to petition government encompasses seeking relief through the courts. By punishing State Farm for its in-court speech, and the purported "lack of remorse" displayed in its pleadings, the Utah court violated State Farm's rights under the First Amendment and the Due Process Clause, and established a precedent that, if left standing, will chill vigorous advocacy and expose defendants to multimillion-dollar punishments simply for making arguments that a court deems "callous." Pet. App. 13a.

A. The Decision Below Is Inconsistent With This Court's First Amendment Jurisprudence

This Court has long recognized that the Constitution guarantees the right of access to the court system as well as the right of litigants to defend their case with zeal and vigor. The First Amendment "protects vigorous advocacy," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and restrictions on the types of arguments attorneys may make in court "implicate[ ] central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). The First Amendment's restrictions are made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *see also Stromberg v. California*, 283 U.S. 359, 368 (1931) ("It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.").

An attorney's speech in pleadings and the courtroom is plainly protected under the First Amendment. In *Velazquez*, 531 U.S. 533, a group of attorneys challenged a statutory provision forbidding the Legal Services Corporation from paying attorneys to take cases challenging existing welfare laws. This Court held that the funding restriction violated the First Amendment, explaining that "[t]here can be little doubt

that the [statute] funds constitutionally protected expression," and recognizing that the obvious import of the statute was to skew "the ordinary course of litigation" by providing that certain positions "cannot be expressed" in court. *Id.* at 548. This Court explained that the restriction on attorney speech was "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case" and that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545; *see also Button*, 371 U.S. at 429-31 (Virginia statute barring legal organization from soliciting cases is unconstitutional under First and Fourteenth Amendments).

The First Amendment also guarantees the right "to petition [the Government] for a redress of grievances"—a right that is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). In the *Noerr-Pennington* line of cases, this Court has recognized that the Petition Clause protects conduct and speech before Congress and the courts aimed at redressing grievances and resolving disputes. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), this Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws" and that such an interpretation "would raise important constitutional questions" with regard to the "right of petition." *Id.* at 135, 137-38. The right to petition the legislature recognized in *Noerr* was extended to petitioning the judiciary in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), where this Court held that "[t]he right of access to the courts is indeed but one aspect of the right to petition." The Court explained that "it would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal

agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests." *Id.*; *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("filing a complaint in court is a form of petitioning activity").

This Court has repeatedly enforced the Petition Clause outside the antitrust context, rejecting attempts to punish companies for taking disputes to court. For example, in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983), this Court held that in light of the "right of access to the courts" guaranteed by the First Amendment, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant." Likewise, in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002), this Court held that an employer's lawsuit was protected by the right to petition and could not form the predicate for a government sanction, explaining that "[e]ven unsuccessful but reasonably based suits advance some First Amendment interests." *See also Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring) ("Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.").[2]

This Court's free speech and right-to-petition decisions reflect the bedrock principle that parties should not be penal-

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[2] In *United States v. Jackson*, 390 U.S. 570 (1968), this Court held unconstitutional a statutory provision allowing for heightened criminal penalties on defendants who exercised their right to a jury trial. The Court held that the "inevitable effect" of the provision was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.* at 581. The Court concluded that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Id.* at 583.

ized for invoking their legal rights and asserting a vigorous defense. "The right to litigate is an important one," *Bill Johnson's*, 461 U.S. at 744, and "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The Utah court in this case, however, expressly punished State Farm for exercising its First Amendment right to litigate and vigorously defend itself by awarding punitive damages for the perceived "callousness" and "lack of remorse" displayed in State Farm's pleadings and litigation positions.

It is plainly improper to punish a litigant for defending the lawfulness of its conduct in court. This principle has particular significance in the context of product liability litigation, where manufacturers are often sued multiple times on the basis of the same alleged defect in their product. In situations where the defendant wins case after case, and then loses in a single instance before a single jury, it is inappropriate to punish that defendant for continuing to defend itself in future actions.

To be sure, a litigant is not absolutely immune from sanction or punishment for in-court speech. A litigant may be sanctioned for filing a frivolous pleading, for example, or for making false or perjurious statements. But the Utah court did not find State Farm's legal positions to have been frivolous or made in bad faith—nor could it have, given that State Farm *prevailed* in its challenge to the punitive damage award. Rather, the Utah court found fault in what it deemed an insufficiently repentant *attitude* manifested in State Farm's briefs. *See, e.g.*, Pet. App. 13a (State Farm "refuses in its brief on appeal to concede any error or impropriety in its handling of the Campbell case") (citation omitted); *id.* ("State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence."); *id.* ("State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells.").

Moreover, even in the context of sanctions, this Court (and many others) have been sensitive to the First Amendment and due process rights at stake and to the dangers of deterring zealous advocacy by attorneys. In *Cooter & Gell v. Hartmarx Corp.*, for example, this Court recognized that Federal Rule of Civil Procedure 11 "must be read in light of concerns that it will . . . chill vigorous advocacy." 496 U.S. 384, 393 (1990). The Court explained:

> If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fees would be likely to chill all but the bravest litigants from taking an appeal.

Id. at 408. The same reasoning applies here: the knowledge that an aggressive defense could ultimately be used as the very basis for *upholding* the punishment would chill vigorous advocacy. *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 68 (1991) (Kennedy, J., dissenting) (a court's "unchecked power" to sanction "can be applied to chill the advocacy of litigants attempting to vindicate . . . important federal rights"); *In re Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986) ("[Z]ealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.") (quotations omitted).

A litigant should not be punished for making arguments that are *reasonable*, even if the court finds the arguments unpersuasive or even erroneous. Many courts have endorsed this principle, holding that when a party's legal position falls within the realm of reasonable argument or debate, sanctions are inappropriate. *See, e.g., Kaplan v. DaimlerChrysler,*

A.G., 331 F.3d 1251, 1255 (11th Cir. 2003) ("[c]ourts assess [Rule 11] sanctions . . . when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument") (quotation omitted); *Gurary v. Winehouse*, 235 F.3d 792, 798 (2d Cir. 2000) (sanctionable conduct occurs "when it is clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands") (quotation omitted); *Metropolitan Life Ins. Co. v. Steffey*, No. 96-2239, 1997 WL 705235, at *1 (6th Cir. Nov. 4, 1997) (reversing sanctions where appellant "made a reasonable argument"). *Cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ("sham" exception to *Noerr-Pennington* immunity requires that "the lawsuit . . . be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits").

The notion that punitive damages are unwarranted where the propriety of the defendant's conduct is open to reasonable debate, or is the subject of a reasonable disagreement within the public or the relevant industry or community, has a long pedigree. In *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915), this Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief"—*even assuming* that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable."

Similarly, in *BMW v. Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and the Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." *Id.* at 579-80. Nevertheless, the Court recognized that BMW, in attempting to determine what it was required to disclose,

"could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578. The Mississippi Supreme Court employed the same reasoning in *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 234 (Miss. 2001), where it held that punitive damages were unjustified in a bad faith lawsuit against an insurer when the insurer "had an arguable or legitimate basis for denying the claim."

This principle has been repeatedly recognized in product liability cases as well, as courts have held that punitive damages cannot be imposed where "there is a genuine dispute in the scientific community as to" the reasonableness of the design. *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995); *see also Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists over risks and utilities of product). In fact, this proposition is so basic to the law of punitive damages that the Fifth Circuit has held that it is "plain error"—*i.e.*, an error "so fundamental as to result in a miscarriage of justice"—to permit a jury to award punitive damages where the evidence "demonstrated a good faith dispute" as to whether the defendant's conduct was lawful. *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (quotation omitted).

In sum, the conduct for which State Farm was punished—in-court speech by its attorneys—falls squarely within the rights of free speech and petition secured by the First Amendment and the Due Process Clause. Given that State Farm's legal arguments succeeded in persuading this Court that the punitive damage award was excessive and unconstitutional, there can be no doubt that its position was reasonable, even if the Utah court felt that the company could

have been less "callous" in asserting it. Punitive damages simply may not be imposed for such speech and this Court should grant State Farm's petition.

B. The Lower Courts Have Split Over Whether Punitive Damages May Be Based On A Party's Litigation Positions And Speech

The decision below compounds the confusion in the lower courts over the relevance of a defendant's litigation conduct to a punitive damage award. Many lower courts, some even in the wake of *State Farm*, have followed the Utah court's approach and relied on a defendant's litigation positions to justify or increase a punitive sanction. Other courts, in sharp contrast, have recognized that such considerations are irrelevant to a punitive damage award. Guidance from this Court is necessary to dispel the confusion in the lower courts and to reject decisively the Utah court's misguided and unconstitutional approach.

Many courts have properly held—directly in conflict with the Utah court—that a defendant's litigation conduct and speech cannot be used as the basis for a punitive damage award. For example, in *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002), the Fifth Circuit explained that an insurer's "litigation positions and tactics"—even those that are "ultimately unsuccessful"—"do[ ] not constitute the kind of malice, willfully wrongful conduct, gross negligence, or reckless disregard for the insured's rights for which punitive damages are properly imposed." The California Supreme Court has similarly recognized that "the potential 'chilling effect' on appeals . . . would be greatly exacerbated if every appellant faced the prospect that a jury might impose additional damages—compensatory and punitive—in a subsequent action based on its assessment of [the appellant's] motive in prosecuting the appeal." *Coleman v. Gulf Ins. Group*, 718 P.2d 77, 81 (Cal. 1986); *accord De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (Ct. App. 2001) (a defendant's "trial tactics and litigation

conduct may not be used to impose punitive damages in a tort action").

Many courts disagree with this approach, however, and specifically rely on the defendant's litigation conduct in assessing punitive damages, just as the Utah court did here. For example, in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.), a decision that cited repeatedly to *State Farm*, the Seventh Circuit emphasized the defendant's "great stubbornness with which it has defended this case" as a major justification for a large amount of punitive damages. Similarly, in *Miller v. Aaacon Auto Transport, Inc.*, 447 F. Supp. 1201, 1206 (S.D. Fla. 1978), the court explained that the "defendant's tactics in this court of grudging retreat, rock by rock, fence row by fence row" were relevant to (although they did not ultimately warrant) a punitive damages award. *See also Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419-22 (Pa. Super. Ct. 2004) (affirming punitive damage award largely on the basis of the defendant insurer's conduct during trial of bad faith claim rather than on conduct giving rise to the claim).

In sum, this Court should grant review to eliminate any doubt that the First Amendment and the Due Process Clause bar the imposition of punitive damages on a defendant for doing nothing more than daring to defend itself in a court of law.

II. THE UTAH COURT'S MISAPPLICATION OF THE RATIO GUIDEPOST DEFIES AND UNDERMINES THIS COURT'S RULING

A. The Ratio Requirement Is A Crucial Constitutional Protection

This Court's decision in *State Farm* reflected and enshrined the important constitutional principle that a punitive sanction must bear a reasonable relationship to the actual harm to the plaintiff caused by the defendant. *See* 538 U.S. at 424-28. Importantly, this Court held that in cases where "compensatory damages are substantial, then a lesser ratio,

perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. This Court then made abundantly clear that the case at bar presents this exact situation, noting that "[t]he compensatory award in this case *was* substantial," and that "in light of the substantial compensatory damages awarded (a portion of which contained a punitive element)," the "likely" result on remand should be "a punitive damages award at or near the amount of compensatory damages." *Id.* at 426, 429 (emphasis added).

The Utah court's decision defies this Court's ruling by approving a 9:1 ratio and imposing a $9 million punitive damage award that dwarfs the $1 million this Court indicated was likely the maximum amount permitted under the Constitution. This decision must not be allowed to stand. If the Utah court is allowed to impose a 9:1 ratio in *this* case—where the relevant factors point to a 1:1 ratio, and this Court explicitly instructed the Utah court that 1:1 was the probable outcome—this Court's holding will be severely undermined. This Court should grant certiorari and confirm that *State Farm* means what it says: although a 9:1 ratio may be the presumptive outermost constitutional limit, it is not the norm, and for cases such as this one, a 1:1 ratio (or something very close to it) may not be exceeded.

In many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction. For example, awards of compensatory damages often include a large component of noneconomic damages, such as awards for pain and suffering or emotional distress. As this Court recognized, these types of noneconomic damage awards are very similar to punitive damage awards in that they "contain [a] punitive element," and "'[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" 538 U.S. at 426 (quoting Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)).

Moreover, noneconomic damages are often plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards. Although this Court emphasized that the presence of noneconomic damages requires a lower ratio, many courts (such as the Utah court, which used the presence of noneconomic damages to *increase* the award, *see* Pet. App. 16a) have misapplied or outright ignored this aspect of *State Farm*. *See, e.g.*, *Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004) (imposing $75,000,000 in compensatory damages, largely for noneconomic harm, and $75,000,000 in punitive damages).

The ratio requirement is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial noneconomic component—so that even a 1:1 ratio can result in a severe sanction. Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. Jurors in such cases are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring). Jurors are not always well suited to make such judgments. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (conclud-

ing that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). *See also* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976).

The result is that product liability cases pose great danger that juries will "use their verdicts to express biases against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994), even more so than in cases involving economic torts, such as this one. A strong affirmation of the ratio principle will help ensure that this crucial constitutional protection is strictly enforced.

B. Many Lower Courts Are Evading *State Farm*'s Ratio Requirement

This Court's guidance on the proper application of the ratio analysis is urgently needed, as the decision below reflects a growing trend. Many lower courts have essentially disregarded *State Farm*'s holding that a 1:1 ratio is the presumptive limit in cases where compensatory damages are "substantial." As the Ninth Circuit recently declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004). These courts have misinterpreted *State Farm*'s language that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 538 U.S. at 425, as presumptively authorizing ratios of up to 9:1 in *any* case. For example, one court reasoned that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggested that any lower ratio "presumptively passes muster under the Due Process Clause." *McClain v. Metabolife Int'l,*

Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003). Another court opined that *State Farm* "guides this court to conclude that . . . a single-digit ratio likely is constitutionally permissible." *Jones v. Rent-a-Center, Inc.*, 281 F. Supp. 2d 1277, 1289 (D. Kan. 2003).

This trend is especially apparent in several recent decisions involving products, a number of which were vacated by this Court and remanded for reconsideration in light of *State Farm*.

For example, in *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), following a GVR, the Oregon court upheld a 96:1 ratio and imposed a $79 million punitive damage award against Philip Morris. Even though the case was brought by the estate of a single plaintiff, the court upheld the award by theorizing that other individuals not before the court may have been harmed by the defendant's conduct—and that the punishment could be justified by reference to these hypothetical persons and imaginary harms. Thus, the court reasoned, because the defendant "inflicted potential harm on the members of the public in Oregon," a punitive award of $79 million was permissible, even though the plaintiff had been awarded only $820,000 in compensatory damages. *Id.* at 144. Acknowledging that the award vastly "exceed[s] a single-digit ratio," the court opined that "it is difficult to conceive of more reprehensible misconduct" and thus the "unique facts in this case . . . justify more than a single-digit award under the Due Process Clause." *Id.* at 145.

In *Douglas v. DaimlerChrysler Corp.*, No. CV2001-019659 (Ariz. Super. Ct. July 2, 2004), the court affirmed a $50 million punitive damage award against DaimlerChrysler—over 13 times the amount of the substantial $3.75 million compensatory damage award—for a purported design defect in a Dodge Ram pickup truck. Relying on the interpretation offered in a law review article by a plaintiff's attorney rather than this Court's plain language, the Arizona court held that "contrary to reports, [*State Farm*] does not require that punitive damages be no more than nine times greater

than compensatory." *Id.* at 5. Moreover, the court held that for purposes of the ratio analysis, the "denominator"—*i.e.*, the baseline amount of compensatory damages—should include the compensatory damages attributable to a nonparty defendant that was held 50 percent responsible for the harm. *Id.* at 1. In short, the court held that DaimlerChrysler could be punished for harm committed by another party—a result that violates *State Farm* and bedrock principles of due process.

In *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible," *id.* at 576, and imposed a $400,000 sanction. *See also Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. Ct. App. 2003) (approving 7:1 ratio in product liability case on remand following GVR).

Finally, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and even though a significant portion of the compensatory awards reflected noneconomic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," *id.* at 763, let alone by this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

This Court should grant review to confirm that the 1:1 ratio in such cases is not, in the words of the Utah court,

merely an "abstract proposition," Pet. App. 15a, but is rather a meaningful limitation on punitive damage awards.

CONCLUSION

For the foregoing reasons, this Court should grant State Farm's petition and schedule this case for plenary review. In the alternative, the Court should summarily reverse the decision below, as the opinion of the Utah Supreme Court is plainly inconsistent with this Court's mandate.

Respectfully submitted.

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